Supreme Court, U.S.
FILED
FEB 6 - 2004
OFFICE OF THE CLERK

(2)

No. 03-974

IN THE

Supreme Court of the United States

IN RE ANDREI KEMP,

Petitioner

BRIEF FOR RESPONDENT JAMES W. DOUGHERTY, ESQ. IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

THOMAS F. QUINN
Counsel of Record
ROBERT A. BERNS
AMY RENEE BALES
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
331 Washington Street
Newark, NJ 07102
(973) 624-0800

Attorneys for Respondent James W. Dougherty, Esq.

185628

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether petitioner has stated an appropriate question of law that may be addressed by this reviewing Court.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iii

Counterstatement of the Facts 1

Reasons for Denying the Petition 4

Petitioner Has Not Presented A Compelling Argument For Grounds For Review Of This Matter By This Court 4

Petitioner Failed To Present A Legal Argument For The New Jersey Supreme Court To Review And Has Failed To Present An Issue Ripe For Review Through A Writ Of Mandamus To The United States Supreme Court 7

New Jersey's Affidavit Of Merit Statute Is Constitutional 9

Conclusion 11

TABLE OF CITED AUTHORITIES

CASES *Page*

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S. Ct. 145, 98 L. Ed. 106 (1953) 12

Chamberlain v. Giampapa, 210 F.3d 154 (N.J. 2000) 9

Commonwealth of Pennsylvania v. Newcomer, 618 F.2d 246 (3d Cir. 1980) 5

Galik v. Clara Maass Medical Center, 167 N.J. 341 (2001) 9

Kerr v. United States District Court for Northern District of California, 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976) 4-5, 7

In re King World Productions, Inc., 898 F.2d 56 (6th Cir. 1990) 7

Will v. Calvert Fire Insurance Co., 437 U.S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978) 7

Yeager v. Greene, 502 A.2d 980 (D.C. 1985) 6

Cited Authorities

Page

STATUTES

28 U.S.C.A. § 1257(a) 4

28 U.S.C.A. § 1651(a) 4

N.J.S.A. 2A:53A-26, *et seq.* 2

N.J.S.A. 2A:53A-27 ..... 9, 10

N.J.S.A. 2A:53A-28 2

RULE

New Jersey Supreme Court Rule 2:12-4 8

COUNTERSTATEMENT OF THE FACTS

Mr. Andrei Kemp (hereinafter "Petitioner") instituted a divorce and custody action against his wife in the Superior Court of New Jersey in April 1997 captioned as *Kemp v. Kepka*, docket number FM-20-01606-97. The contentious matrimonial litigation ended with a dual judgment of divorce entered on November 20, 1998. Unsatisfied with the outcome of the divorce proceeding judgment, petitioner retained Respondent James Dougherty, Esq. ("Respondent Dougherty") to address rulings the Petitioner deemed to be unfair or oppressive. Petitioner claimed that Respondent Dougherty advised him to file a motion requesting a revision of the judgment before filing an appeal. Petitioner regarded Respondent Dougherty's advice to be a manipulation and "refused to accept his help" because he mistrusted Dougherty. As a result, Petitioner fired Respondent Dougherty and proceeded to represent himself *pro se*.

Thereafter, as a result of Petitioner's perception that he was wrongly treated in the divorce case, on July 24, 2000, he filed a Complaint alleging professional negligence and misconduct against five psychiatric experts who testified during the divorce case, a court appointed psychologist, and the two attorneys involved in the divorce action – including his former lawyer, Respondent Dougherty.

Petitioner alleged that the court appointed psychologist was dishonest in his assessment of petitioner's "serious psychological problems." Petitioner also alleged that the defendant psychiatrists covered up for the court appointed psychologist by testifying that Petitioner suffered from "paranoia." In his claim for legal malpractice, Petitioner alleged that Respondent Dougherty provided negligent

advice. However, as Petitioner failed to serve Affidavits of Merit against any of the defendant professionals as required by New Jersey's Affidavit of Merit Statute N.J.S.A. 2A:53A-26, *et seq.*, the professional defendants moved to dismiss Petitioner's Complaint.

Petitioner opposed the motions by arguing that his claims were protected by the sworn statement exception set forth in N.J.S.A. 2A:53A-28. Petitioner argued that he requested discovery from the defendant professionals (copies of court records) necessary for him to obtain affidavits of merit. However, it is undisputed that Petitioner never served discovery requests upon Respondent Dougherty.

At oral argument on August 4, 2000, Petitioner explained to the trial court that he had attempted to obtain Affidavits of Merit against each of the defendant professionals but had been unable to find affiants willing to opine that any of the medical or legal professionals deviated from the standard of care. Petitioner could not locate experts who would vouch for the merit of his legal malpractice and medical malpractice claims.

After questioning Petitioner extensively on the issue of his efforts to obtain affidavits of merit, the trial court concluded that Petitioner had failed to satisfy the requirements of the Affidavit of Merit Statute. Moreover, the Court determined that even if Petitioner had obtained records from the professional defendants, nevertheless, Petitioner failed to satisfy the requirements of the Act by failing to serve Affidavits or Merit.

Petitioner appealed the trial court's decision to the New Jersey Appellate Division, which rejected each argument

advanced by Petitioner, including his argument that the "common knowledge" exception to the Affidavit of Merit Statute applied. In its March 12, 2004 opinion, the Appellate Division stated:

> This is plainly not such a case [- common knowledge]. Considering the nature of the allegations, expert testimony is clearly required to establish the applicable standards of care in the legal, psychological and psychiatric professions, and how each defendant breached them.

See Pet. App., Ex. A, at p. 6.

Significantly, the court expressly found that Petitioner possessed all records needed to obtain an Affidavit of Merit. *See* Pet. App., Ex. A, at pp. 6-7.

Petitioner thereafter filed a Petition for Certification with the New Jersey Supreme Court, alleging that he was unable to obtain an Affidavit of Merit due to the corruption of New Jersey's judiciary and its judicial system. New Jersey's Supreme Court correctly denied this Petition on July 1, 2003. As a result, Petitioner filed the within Petition for Writ of Mandamus.

REASONS FOR DENYING THE PETITION

PETITIONER HAS NOT PRESENTED A COMPELLING ARGUMENT FOR GROUNDS FOR REVIEW OF THIS MATTER BY THIS COURT

Respondent James Dougherty, Esq. respectfully opposes Andre Kemp's Petition for Writ of Mandamus. The Petitioner has failed to meet the established criteria governing review and has not set forth compelling reasons for this Court to exercise its discretion to grant the extraordinary writ, which is sparingly granted. Petitioner fails to present a question of law that may be reviewed by this Court where "the validity of a statute of [this] State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C.A. § 1257(a). Petitioner's professional negligence claims derive from New Jersey common law negligence principles. The Affidavit of Merit Statute is a New Jersey law that establishes a threshold showing that the asserted claim is meritorious. Neither the negligence claim nor the Affidavit of Merit presents an issue that concerns or impacts the Constitution, treaties, or laws of the United States. Rather, Petitioner's application merely presents unsubstantiated accusations and innuendo, and threats of violence to the judiciary of New Jersey. Consequently, Petitioner has not presented any grounds for judicial review by this Honorable Court.

Additionally, Petitioner has failed to present adequate grounds for this Court to grant review under 28 U.S.C.A. § 1651(a). The remedy of mandamus is drastic and only should be invoked in extraordinary situations as it amounts to a judicial "usurpation of power." *Kerr v. United States Dist. Court for Northern Dist. of California*, 426 U.S. 394,

96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976); *Commonwealth of Pennsylvania v. Newcomer*, 618 F.2d 246 (3d Cir. 1980). Moreover, granting an extraordinary writ is a function of this Court's discretion and is only warranted in exceptional cases. *Kerr v. United States Dist. Court for Northern Dist. of California*, 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976).

Here, although not directly states as such, Petitioner appears to suggest that a Writ of Mandamus should issue because he was denied due process rights guaranteed under the Fourteenth Amendment. Nothing could be further from the truth.

This matter does not arise out of a deprivation of rights but rather out of Petitioner's disgruntlement with the outcome of his divorce proceeding from which he pursued professional malpractice claims against the attorneys and consulting medical professionals who were involved in that case, a matter that has been fully reviewed by New Jersey's courts. Petitioner refuses to accept that he had a full and fair opportunity to present his case and that he failed to present viable or meritorious claims against the professional defendants, including Respondent Dougherty. In response, Petitioner submits the within petition for an extraordinary writ – in reality a rambling jeremiad chock full of invective, innuendo, and paranoia that decries "judicial anarchy and conspiracy."

Petitioner's application to this Honorable Court betrays itself. Petitioner's writ does not seek to vindicate justice but rather belittles the judicial system and presents an affront to New Jersey's appellate process. Petitioner had his day in court, and the trial court, the Appellate Division and the

New Jersey Supreme Court ruled against him. Precedent and sound reasoning supported each of those decisions. Petitioner has not presented a scintilla of evidence to show that the rulings of the New Jersey court were egregious abuses of discretion that would support a claim to deprivation of due process and fundamental fairness. *Yeager v. Greene*, 502 A.2d 980 (D.C. 1985). Petitioner present application is nothing more than a continuation of his tirade against the judicial system, one that includes the threat of physical violence and harm.

Point 4 of Petitioner's Questions Presented offers the following "legal point."

> BRINGING JUSTICE TO THE JUDICIAL SYSTEM ELIMINATES **POTENTIAL ACTS OF VIOLENCE BY VICTIMS OF THE CORRUPT JUDGES**. SHOWING THAT THE SUPREME COURT DOES NOT TOLERATE SOVIET-STYLE JUSTICE IS AN IMPORTANT STEP IN **PREVENTING VIOLENCE AND TERRORIST ACTS** BY ELIMINATING REASONING BEHIND SUCH ACTS. THE CASE SHOULD BE SENT FOR RE-TRIAL BY HONEST JUDGES.

Pet. (i) (emphasis added).

Conduct of the kind exhibited by Petitioner is not acceptable, cannot be tolerated by this Honorable Court and falls far short of articulating a colorable issue for review in the form of an extraordinary writ. Petitioner has failed to demonstrate a clear and indisputable right to an extraordinary writ. Accordingly, Mr. Kemp's Petition for a Writ of Mandamus should be denied.

PETITIONER FAILED TO PRESENT A LEGAL ARGUMENT FOR THE NEW JERSEY SUPREME COURT TO REVIEW AND HAS FAILED TO PRESENT AN ISSUE RIPE FOR REVIEW THROUGH A WRIT OF MANDAMUS TO THE UNITED STATES SUPREME COURT

The mandamus remedy is a drastic remedy that should be invoked only in extraordinary situations where a petitioner's right to relief is clear and indisputable. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62, 98 S. Ct. 2552, 2556-57, 57 L. Ed. 2d 504 (1978); *Kerr v. United States Dist. Court*, 426 U.S. 394, 402-03, 96 S. Ct. 2119, 2123-24, 48 L. Ed. 2d 725 (1976). The writ is only issued in exceptional circumstances where there has been a "clear abuse of discretion or 'usurpation of judicial power'" *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S. Ct. 145, 148, 98 L. Ed. 106 (1953). "The traditional use of the writ of mandamus has been to confine a lower court to lawfully exercise its prescribed jurisdiction or compel it to exercise its authority when it is its duty to so act." *In re King World Productions, Inc.*, 898 F.2d 56, 58 (6th Cir. 1990); *see Kerr*, 426 U.S. at 402, 96 S. Ct. at 2123-24.

Petitioner has failed to provide an argument that will move this Court to grant his request for a writ of mandamus. Petitioner has not provided this Court with proof of an exceptional circumstance demonstrating that the New Jersey courts acted under a "clear abuse of discretion, or usurpation of judicial power."

The New Jersey Supreme Court correctly denied Petitioner's Petition for Certification because there was no question of law for the court to address. Pursuant to

New Jersey Court Rules, petitioner lacked the grounds required for Certification to the New Jersey Supreme Court. Rule 2:12-4 provides:

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matter if the interest of justice requires.

Petitioner asserted the following grounds for Certification to the New Jersey Supreme Court:

> The Certification should be granted on the ground that the matter presents a question of general public importance (Affidavit of Merit is impossible to obtain in some cases due to the culture of corruption in the State of New Jersey), Legal Arguments, Point VI and also that the interest of justice requires such certification.

Petitioner did not set forth an argument that satisfied the standard for obtaining Certification. Petitioner failed to demonstrate an error in the appellate court's decision, and was unable to point out a conflict between the appellate court's decision and any other state court decision, particularly since Petitioner admitted during the trial court proceeding that he failed to and could not obtain affidavits of merit against the defendant professionals.

Petitioner's present application to this Court similarly should be denied because it fails to properly state a question of law that may be addressed by this reviewing court. Therefore, Petitioner's request for a writ of mandamus should be denied.

NEW JERSEY'S AFFIDAVIT OF MERIT STATUTE IS CONSTITUTIONAL

The Affidavit of Merit Statute was designed as a tort reform measure and requires a plaintiff in any malpractice action to provide an affidavit of an appropriate expert stating that the plaintiff's claim is meritorious. *Chamberlain v. Giampapa*, 210 F.3d 154 (N.J. 2000); *Galik v. Clara Maass Medical Center*, 167 N.J. 341 (2001). The statute is designed to weed out frivolous malpractice suits at an early stage thereby allowing meritorious cases to proceed. *Galik*, 167 N.J. 341. The Affidavit of Merit Statute, N.J.S.A. 2A:53A-27, states:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional

> period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause. The person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

N.J.S.A. 2A:53A-27.

The statute is constitutional as it rationally relates to the legitimate government interest of weeding out frivolous lawsuits at an early stage. Furthermore, the statute is uniformly applied to "all lawsuits involving an alleged act of malpractice or negligence by a licensed person in his profession or occupation." *Id.* Pursuant to the rational basis standard, petitioner carries the burden of proving that this statute, which is presumed valid, is unconstitutional. Petitioner has failed to set forth any legal arguments challenging the validity of the Affidavit of Merit Statute. Instead, Petitioner has made terroristic threats against the judiciary of New Jersey, has fabricated aspersions and requests this Court to act in an unconstitutional manner by subverting the separation of judicial and legislative powers.

CONCLUSION

For the foregoing reasons, petitioner's request for a writ of mandamus should be denied.

Respectfully submitted,

THOMAS F. QUINN
Counsel of Record
ROBERT A. BERNS
AMY RENEE BALES
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
331 Washington Street
Newark, NJ 07102
(973) 624-0800

Attorneys for Respondent
James W. Dougherty, Esq.